SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-906

J. LOYD PARKER, JR.,
Petitioner,

v.

W. J. ESTELLE, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, J. Loyd Parker, Jr., respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 5, 1974.

OPINIONS BELOW

The Opinion of the Court below is reported at 498 F.2d 625; a copy of that Opinion appears in Appendix I, pp. 1a-10a, *infra*, and of the Judgment of the Court below, in Appendix II, p. 11a, *infra*. A copy of the Order denying the Petition for Rehearing, entered on October 24, 1974, appears in Appendix III, p. 12a, *infra*. The Order Adopting Findings and Conclusions of Magistrate, issued by the

United States District Court for the Northern District of Texas, is not reported. A copy appears in Appendix IV, p. 13a, *infra*. The Findings, Conclusions and Recommendation of the United States Magistrate are not reported. A copy appears in Appendix V, pp. 14a-21a, *infra*. The Opinion of the Court of Criminal Appeals of the State of Texas (hereinafter referred to as "Texas Court") in the 1963 Application for a Writ of Habeas Corpus is reported at 370 S.W.2d 882, and a copy appears in Appendix VI, pp. 22a-23a, *infra*. The Opinion of the Texas Court on the appeal from the conviction is reported at 457 S.W.2d 638, and a copy appears in Appendix VII, pp. 24a-30a, *infra;* and its Opinion on the post-conviction application for the writ is reported at 485 S.W.2d 585, and a copy appears in Appendix VIII, pp. 31a-37a, *infra*.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on August 5, 1974. A timely Petition for Rehearing *En Banc* was denied October 24, 1974, and this Petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May a State hold that a defendant incompetent to stand trial has waived his right to a contemporaneous jury verdict on sanity or insanity at the time of the commission of the offense and a judgment of acquittal upon a verdict of insanity, as prescribed in the State Code of Criminal Procedure?

2. Where a defendant is found to be incompetent to stand trial a few months after the alleged offense

was committed and where State officials believed at that time that he would be found by a jury to have been insane at the time the crime was committed and thus be acquitted in conformance with State law, may State officials so deal with such defendant as to keep his case open and years later subject him to criminal liability?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment

The Fourteenth Amendment of the Constitution of the United States reads in pertinent part as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Texas Code of Criminal Procedure

In 1963, at the time pertinent hereto, Article 932(b) of the Texas Code of Criminal Procedure read in pertinent part as follows:

> "Section 1. In any case where the question of the insanity of a defendant is raised and that issue is tried alone before the main charge or is tried in connection with the main charge, the jury *shall state* in their verdict *whether the defendant was sane or insane at the time the offense is alleged to have been committed* and whether the defendant is sane or insane at the time of the trial.
>
> "(a) *If the jury finds the defendant to have been insane at the time the offense is alleged to have been committed, the defendant shall stand acquitted of the alleged offense.*"[1]

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[1] Emphasis added throughout this Petition unless otherwise noted.

STATEMENT OF THE CASE

In May 1963, Petitioner was charged with murder with malice of his father in the District Court of Tarrant County, Texas, at Fort Worth. The question of Petitioner's insanity was raised. As set out above, the Texas Code of Criminal Procedure then mandated that the jury verdict in every such case include a finding of sanity or insanity as to both the legally critical times, the time of the offense as well as the time of the trial. It specified further that a verdict of insanity at the time of the offense would constitute a judgment of acquittal. Contrary to these imperatives of the law, the State prosecutors and the State District Court so conducted themselves that the only issue submitted to the jury in July 1963 was whether Petitioner was competent to stand trial. The jury was not permitted to consider, and consequently contrary to the statute did not state in its verdict, whether Petitioner was sane or insane at the time the offense was alleged to have been committed.

The State prosecutors resisted the submission of this issue to the jury because they evidently believed that the jury would find Petitioner insane at the time of the alleged offense. Doug Crouch, who was District Attorney for Tarrant County at that time, testified in 1969 as follows:

> "A. * * * The way this thing came about was that Judge 'Dutch' Winters, then a prosecutor on my staff, came into my office about five minutes before the time for the hearing or for the trial to start up here in this Courtroom and informed me that there were eight psychiatrists, that all eight of them, including the three that the State had asked to look at the man, were about to testify that the man was insane.

"Q. I see. Then what?

"A. And that *he also was insane at the time of the offense.* They were going to—I think either the majority of them or all of them—were going to testify that he was insane at both times.

"Q. I see. What did you do?

"A. I told Judge Winters, I said, 'Do you think you have a chance of winning up there in the Courtroom?'

"He said, 'We don't have a single witness except lay witnesses. I don't see how we could.'

"Then I asked him, I asked Dutch Winters if he could get an agreement then on insanity now and then reserve the insanity at the time of the offense so that he could be tried later on. *Of course, there would have been no trial if we had gone according to what the psychiatric testimony was supposed to have been* according to Judge Winters at that time." Appendix in the Court below (hereinafter referred to as "Ct. Apls. App."), 362-363.

Criminal District Judge J. E. Winters, who was then an assistant district attorney, testified likewise:

"A. Well, as I remember—I believe that the defendant's lawyer at that time, Mr. Cochran, and Mr. Tesner, had hired something like eleven psychiatrists. Each one of the psychiatrists found that Mr. Parker was insane.

"Q. *Both at the time of the trial and at the time of the offense?*

"A. *Yes.* The State had four psychiatrists that I remember and three out of the four said he was insane. We had one psychiatrist and after he discovered that there was that many of his brethren [*sic*] who held otherwise from his con-

clusions, he was hesitant about testifying." *Id.* at 380.

While he did intimate that he was prepared to go to trial on the insanity issue on the basis solely of lay testimony, Judge Winters' ultimate judgment was:

> "I told Mr. Crouch that day that in view of all the psychiatric evidence against the State of Texas, that it was my opinion that *Mr. Parker would be found insane.*" *Id.* at 383.

Judge Winters successfully devoted himself to persuading counsel retained by Petitioner's wife to withdraw the request which had been filed for a jury verdict of insanity as of the time of the commission of the alleged offense. As he testified, "at the time we had a pretty good hassle right here in this Courtroom, conference after conference, myself and the District Attorney and [counsel retained by Mrs. Parker] * * * and we did, after quite a bit of talk, come to an agreement whereby the allegation with reference to insanity at the time of the commission would be taken out of the petition and abandoned and that they would proceed on temporary insanity alone that I agreed, I agreed to go along with." Ct. Apls. App. 225.

As a consequence of this State action, only the issue of competency to stand trial was submitted to the jury in July 1963, not the issue of insanity at the time of commission. The jury verdict was thus limited to finding Petitioner incompetent to stand trial. At that time, Petitioner was obviously himself in no condition, as a matter of fact or law, to appreciate the significance of what was occurring with respect to his rights and liberty, nor in particular knowingly or in-

telligently to waive any right.[2] Petitioner's condition was such that the counsel retained for him by his wife testified, "we had very little communication with Mr. Parker." Ct. Apls. App. 228. Manifestly, Petitioner was incapable of waiving the uniquely valuable and vital right to be declared insane at the time of the commission, and thus stand acquitted. The short of this case is that if that waiver had not been accepted, according to the State's own expectations set forth above, Petitioner would have then received a judgment of acquittal and the State could constitutionally have instituted no further proceedings against him.

Following the finding that he was incompetent to stand trial, Petitioner was committed to the State Hospital for treatment. In 1969, the Director of the State Hospital certified him to be sane and he was found by a jury competent to stand trial. In June 1969, Petitioner was subjected to trial on the charge of murder with malice of his father in 1963. At the conclusion of the State's case, the defense rested. Evidently, 1969 counsel considered that it was too late to raise any question of insanity at the time of commission realistically or effectively.[3] Petitioner was found guilty and sentenced by the jury to ten years.

Petitioner's conviction was affirmed by the Texas Court (457 S.W.2d 638; Appendix VII, *infra*). Thereafter, Petitioner applied for a writ of habeas corpus to the State Court. The same Judge who had tried the case in the Texas criminal District Court heard and

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[2] Indeed, pretermitting the thorny legal question of whether a guardian appointed in a civil proceeding can waive any right of a defendant in a criminal proceeding, the fact is that no guardian had been officially appointed for Petitioner at that time. This appointment was made *following* the finding of incompetency.

[3] See p. 10, n. 4, *infra*.

denied the application. The Texas Court affirmed (485 S.W.2d 585; Appendix VIII, *infra*).

This Federal application for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2255 was denied by the United States District Court for the Northern District of Texas, and the Court below affirmed. On the issue of the State's depriving Petitioner of the provisions of its own criminal law, the Court of Appeals held, "[e]ven assuming we could find the state had an affirmative duty under its statute to submit the issue, the right remains purely one created by state statute and not a matter of constitutional mandate. *Hence, this claim is not cognizable on federal habeas corpus.*" 498 F.2d at 628; Appendix I at p. 6a, *infra*. This holding, critical to the judgment below, is manfestly erroneous; see pp. 13-14, *infra*.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT BELOW IS IN IRRECONCILABLE CONFLICT WITH PATE v. ROBINSON, 383 U.S. 375 (1966), AND OTHER DECISIONS OF THIS COURT.

The holdings below are utterly antagonistic to those of this Court in *Pate* v. *Robinson*, 383 U.S. 375 (1966) and other cases. The refusal to provide Federal habeas corpus relief when a State has denied a hearing and failed to make any finding as to insanity at the time of the commission of the alleged offense, upon being confronted with evidence of such insanity, cannot be reconciled with fundamental principles of Constitutional law expounded by this Court.

A. The Decision Below Is In Conflict With Pate v. Robinson

The basic issues before this Court in *Pate* v. *Robinson*, 383 U.S. 375 (1966), cannot be distinguished

from those confronting the Courts below in this case. In both cases, defendant made a claim of insanity at the time of commission as well as incompetency at the time of trial; and there was evidence acknowledged by the State to the effect that the defendant was insane at the time of the offense. Procedurally, in both cases there was no hearing or finding as to insanity; and the conviction had been sustained through the State procedures and a Federal habeas corpus petition duly filed. As in this case, in *Pate* v. *Robinson* the justification proffered to the Federal habeas corpus Court by the State for its failure to hold a hearing and make a finding was that any such right had been waived:

> "The State concedes that the conviction of an accused person while he is legally incompetent violates due process, *Bishop* v. *United States,* 350 U.S. 961 (1956), and that state procedures must be adequate to protect this right. It insists, however, that Robinson intelligently waived this issue by his failure to request a hearing on his competence at the trial; and further, that on the basis of the evidence before the trial judge no duty rested upon him to order a hearing *sua sponte.*" *Id.* at 378.

This Court's rejection of that defense in *Pate* v. *Robinson* should have been followed by the Court below:

> "The State insists that Robinson deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law. But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384.

Identically, it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the State Court and jury determine his criminal responsibility *vel non* at the time of the commission of the offense, together with his capacity to stand trial, and as prescribed in the State law. In all law, psychology and common sense, how can a defendant incompetent to stand trial be held to possess sufficient personal and human mind, will, capacity and understanding to waive a statutory commandment that a finding be made as to his insanity at the time of the offense, a finding which dictates a judgment of acquittal?

In *Pate* v. *Robinson,* this Court held that the State conviction could not stand. That holding demands reversal here. In *Pate* v. *Robinson,* this Court remanded the case but expressed grave doubt that Robinson could or should be retried "[s]ince we do not think there could be a meaningful hearing on [competency] at this late date," 383 U.S. at 377, which was seven years after the conviction.[4] In this case, the denial of a hearing on insanity as expressly directed by the State Code of Criminal Procedure occurred almost a

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[4] Likewise, there could have been no meaningful hearing in 1969 as to Petitioner's sanity at the time of the commission of the offense six years earlier. In 1969 Petitioner was sane and competent; as a practical matter it would have been impossible for the 1969 jury to perceive or understand either how he appeared and acted in 1963 or the nature and basis of the psychiatric evidence that he had been insane when the crime was committed in 1963. The nub of the matter is that if Petitioner had received the due process to which he was entitled at the hands of the State in 1963, he would have been acquitted by reason of insanity at the time of the alleged offense; and there could have been no trial for that offense at that time or any other time. Accordingly, it blinks reality to contend that the 1969 trial has relevancy to this Petition.

dozen years ago. To suffer the judgment below to go unreviewed by this Court is to countenance and encourage defiance of *Pate* v. *Robinson*.

B. The Judgment Below, Sustaining The Trial And Conviction Of Defendant Whose Insanity At The Time Of Commission Was Evidenced But Not Adjudicated, Cannot Be Reconciled With The Bedrock Precept Of Criminal Law, Embraced By The Due Process Clause And Expressed By This Court, That Criminal Responsibility And Punishment May Be Imposed Only Upon Those Who Were Sane At The Time Of Commission.

The State Court conduct sustained below inexorably embraces the result that the State of Texas has tried and convicted a man who was insane at the time the crime was committed. Any such result betrays hostility to the assumptions consistently made by this Court as to the most fundamental principles of criminal law, certainly antedating the adoption of the Constitution and its concept of Due Process.

This Court has always accepted it as axiomatic that criminal trials must conform faithfully to:

> "* * * the humane principle, existing at common law and recognized in all the cases * * * that, 'to make a complete crime cognizable by human laws, there must be both a will and an act'; and 'as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act, consequent upon such vicious will.' 4 Bl. Comm. 21. * * *
>
> "One who takes human life cannot be said to be actuated by malice aforethought, or to have deliberately intended to take life, or to have 'a wicked, depraved, and malignant heart,' or a heart 'regardless of society duty and fatally bent

> on mischief,' unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act. * * * All admit that the crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts." *Davis* v. *United States,* 160 U.S. 469, 484-485 (1895).

This Court has not deviated from the foundation principle that the "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil" is a core concept that is "universal and persistent in mature systems of law." *Morissette* v. *United States,* 342 U.S. 246, 250 (1952). *Pate* v. *Robinson,* 383 U.S. 375 (1966), is thus only a more recent illustration that this Court instinctively acknowledges that the concept of Due Process embraces this humane and historic principle, which found legislative expression in the provision of the Texas criminal law implicated herein, that a defendant unable by reason of insanity to make such a free choice between good and evil may not be treated as a criminal at the hands of the law but must be acquitted.

C. The Holdings Below That The Right To The Verdict On Insanity Required By State Law (1) Had In Fact Been Waived And (2) Would Involve No Constitutional Issues If Held Waived Conflict With The Decisions Of This Court.

1. The holding below that Petitioner waived his rights cannot be harmonized with the judgments and elucidations of this Court directed to waiver in the Federal habeas corpus context. "The classic definition of waiver enunciated in *Johnson* v. *Zerbst,* 304 U.S. 458, 464—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the

controlling standard." *Fay* v. *Noia*, 372 U.S. 391, 439 (1963).

Manifestly, intentional relinquishment or abandonment, and indeed knowing and understanding the rights and privileges which are available and useful, cannot be accomplished by an insane or incompetent person. By legal prescription, that person is unable to waive any rights or privileges; and none can be waived on his behalf. No Court may Constitutionally presume intentional or knowing action by such a defendant, whoever purports to be waiving a basic right on his behalf. As he himself cannot waive those rights, those rights cannot be waived for him—by his wife, counsel selected by his wife, or anyone else who purports to speak or act on his behalf. For a Court to accept and enforce such waiver so clearly constitutes an unconstitutional deprivation of basic individual rights as to merit review of the case by this Court.

2. The holding below that rights created by State statutes could not possibly give rise to valid or cognizable Federal habeas corpus petitions is likewise antagonistic to decisions of this Court. The Court below cavalierly disregarded the reality that most if not all Federal petitions for habeas corpus arising from convictions in State Court involve some issue of State law—such as State criminal insanity provisions, e.g., *Pate* v. *Robinson*, 383 U.S. 375 (1966); *Westbrook* v. *Arizona*, 384 U.S. 150 (1966). Likewise, issues directed to the availability or accessibility of appeal or other remedies under State procedural statutes and practices have frequently been considered by this Court in Federal habeas corpus cases and been adjudicated as violations of the Due Process or Equal Protection

Clauses of the United States Constitution; e.g., *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966) and cases cited therein; *Blackledge* v. *Perry,* 417 U.S. 21 (1974) and cases cited therein. Even in the context of civil law, this Court has held that a State may not cut off summarily a significant right granted by one of its statutes. *Bell* v. *Burson,* 402 U.S. 535 (1971); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

Manifestly, the Court below was in error in holding that the acceptance of the purported "waiver" under these circumstances raised no Federal question and could proffer no issue of denial of Constitutional rights. Inasmuch as this assumption of lack of jurisdiction was the only basis it asserted for failing to consider and grant Petitioner's claim that the State had denied him the procedure which would have resulted in a mandatory judgment of acquittal, the decision below could not be sustained if it were subjected to the scrutiny of this Court.

This Court has recognized that the question as to whether a State's acceptance and enforcement of a "waiver" of rights in a criminal case comports with the Constitution is one which merits consideration as it arises in different contexts; e.g., *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 237-238 (1973) and cases cited therein; *Pate* v. *Robinson,* 383 U.S. 375 (1966). That question is presented in this case in a context never clearly decided by this Court, an alleged waiver of the historic right to be acquitted of an alleged crime committed while the defendant was insane. The decision below accepting and enforcing such a waiver is incompatible with the decisions of this Court and should not be permitted to stand without plenary review by this Court.

II. THE CONDUCT OF THE STATE OFFICIALS, VIOLATING THE LAW IN FAILING TO OBTAIN A VERDCT AS TO INSANITY AT THE TIME OF COMMISSION AND CUTTING OFF PETITIONER'S RIGHTS TO SUCH A VERDICT, WHEN THEY KNEW THE EVIDENCE DEMONSTRATED HE WAS INSANE, WARRANTS REVIEW BY THIS COURT.

The spectacle presented by this record is that of State prosecutorial and judicial officers failing to comply with a statute mandating that the jury include in their verdict a finding as to insanity at the time of the commission of the offense, and bringing their powers to bear upon the purported representatives of Petitioner to "waive" his right to such a verdict and the consequent judgment of acquittal, all the time knowing that the evidence demonstrated such insanity, with the abhorrent result of inflicting criminal liability upon a defendant who was evidently insane at the time of the commission of the alleged offense. Such conduct patently invites review by this Court.

The Court below attempted to mitigate the responsibility of the State by suggesting that the Assistant District Attorney primarily responsible for the case in 1963 was of a different opinion from the District Attorney and the psychiatrists. 498 F.2d at 628; App. I at 6a. Surely, however, the official ultimately responsible, the District Attorney, cannot escape the responsibilities of his office and his profession by assigning the case to someone who would be willing to engage in conduct and attempt to obtain a verdict which the District Attorney himself believed was improper and unsupportable. *Cf. Giglio* v. *United States*, 405 U.S. 150, 154 (1972); *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). Surely the District Attorney's Office in its entirety had the duty to act responsibly

upon the evidence and avoid efforts to hold open a criminal case against a person about to be declared insane because of a personal feeling in defiance of the objective evidence. The fundamental principle that the Constitution denotes a government of laws, and not of men, demands that result. Prosecutorial actions pursuant to personal feelings, and State judicial approval thereof, would bear the stamp of Constitutional approval if the decision below were to be left as the final judicial pronouncement on this subject.

The very purpose and effort of the actions of the Texas prosecutors, knowingly accepted and acted upon by the Texas District Court, apparently were to preclude or inhibit Petitioner's obtaining the full protection of the Texas statute which compelled the interpretation of the trial of the insanity and competency issues in one pretrial proceeding. The State actions had as their purpose the coercion of Petitioner's representatives into making an election not authorized or countenanced by the State law. According to the record, Petitioner was afforded only one of the twin rights provided by the State law, the right to be declared incompetent to stand trial; he was required to sacrifice the other and indeed more basic right, the right to be exculpated from criminal responsibility and to obtain a judgment of acquittal by reason of insanity at the time of the commission of the offense.

State action which thus "serve[s] to 'chill the exercise of basic constitutional rights'" is "'patently unconstitutional.'" *North Carolina* v. *Pearce,* 395 U.S. 711, 724 (1969), quoting *United States* v. *Jackson,* 390 U.S. 570, 581 (1968). "For the evil * * * is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages*

them." *United States* v. *Jackson, supra,* 390 U.S. at 583 (emphasis in original). Texas officials patently exceeded Constitutional bounds under this touchstone in achieving the result that Petitioner's sanity at the time of the commission of the offense was never adjudicated. *Cf. Santobello* v. *New York,* 404 U.S. 257 (1971), and cases cited therein. "In these circumstances," as in *Simmons* v. *United States,* 390 U.S. 377, 394 (1968), it appears "intolerable that one constitutional right should have to be surrendered in order to assert another."

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the Judgment and Opinion of the Fifth Circuit.

Respectfully submitted,

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